No. 84-608

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WESTINGHOUSE ELECTRIC CORPORATION, *et al.*,

Petitioners,

—against—

S/S LESLIE LYKES, her engines, etc., *in rem,* and LYKES BROS. STEAMSHIP CO., INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF

The petition sets forth four rulings of law by the Fifth Circuit herein which are believed to be in conflict with rulings by other Circuits.

The brief in opposition, although posing different questions for review and thus perhaps inferentially disagreeing with the alleged materiality or substance of the questions set out in the petition, seemingly specifically attacks as being inappropriate for review by this Court only three of the four areas of conflict, which are proposed in the petition.

We shall discuss pertinent arguments raised in the Brief in Opposition in the order in which the questions suggested for review appeared in the petition.

The Owner's Responsibility for Proper Loading. (Petition, pp. 7-10)

Under this heading we discussed the question whether the Fifth Circuit's ruling in this case, that design or neglect with respect to negligent stowage requires proof that management had actual knowledge that the access manhole would be blocked by cargo on the voyage of the fire, was correct rather than the Second Circuit's conflicting view that there is design or neglect if management should have known that the manhole would be blocked, as the District Court found, as that was the carrier's longstanding practice.

We cited *Great Atlantic & Pacific Tea Co.* v. *Lloyd Brasileiro,* 159 F. 2d 661, 665 (2d Cir.) *cert. denied, sub nom., Lloyd Brasileiro* v. *Great Atlantic & Pacific Tea Co.,* 331 U.S. 386 (1947), and *Verbeeck* v. *Black Diamond Steamship Corp.,* 269 F. 2d 68, 71 (2d Cir. 1959), *cert. denied, sub nom. Skibs A/S Jolund* v. *American Smelting & Refining Co.,* 361 U.S. 934 (1960) in support of the position that there is a conflict on this issue.

No specific reference is made to these decisions in the brief in opposition, and the point that there is a conflict must be taken as conceded unless the assertion appearing on its page 6 that the "alleged conflict between the Second and Fifth Circuits" is nonexistent as the present case is in accord with the Second Circuit's *In the Matter of the Complaint of TA CHI NAVIGATION (PANAMA) CORP., S.A., as Owner of the S.S. EURYPYLUS, etc.*, 677 F. 2d 225 (2d Cir. 1982), was intended to be in rebuttal. In fact, EURYPYLUS did not deal with the issue under consideration. No finding had been made as to whether there was design or neglect. The case was sent back for a determination of that issue as the Second Circuit ruled that the lower Court's reliance on *Sunkist Growers, Inc.* v. *Adelaide Shipping Lines Ltd.*, 603 F. 2d 1327 (9th Cir. 1979) was misplaced.

It should be noted that the Fifth Circuit did not disturb the finding of the lower Court herein that the negligent blocking of the access manhole was a proximate cause of the cutting of the access hole in the bulkhead which contributed to the flooding damage in #4 hold. (734 F. 2d at pp. 214-215.) Hence, a resolution by this Court of the conflict between Second and Fifth Circuits in favor of the Second's view that there is design or neglect if management should have known that the cargo would be improperly stowed to block access in accordance with customary company procedure would resolve this case without the extended analysis of the findings of fact respondent appears to contend would be necessary. (Brief in Opposition, p. i.)

The Extinguishment of the Fire. (Petition, pp. 10-12.)

Petitioners second question for review concerned the conflict between the Fifth Circuit's ruling in this case and prior rulings of the Second and Ninth Circuits on management's responsibility for fighting fire aboard a vessel in port.

Respondent maintains that the question is not open for re-

view by virtue of this Court's rule that concurrent findings of fact by two Courts below will not be reviewed in the absence of very obvious and exceptional showing of error. (Brief in Opposition, p. 12.)

The position is untenable. This is not a question of fact, but of law. The District and the Circuit courts in any event applied two different standards.

The District Court found that neither suggestions made by Home Office Management nor the active assistance of the port engineer aboard the vessel constituted "control such as to contribute the fire fighting endeavors to Lykes' management". (See Note 10, 734 F. 2d, p. 215.)

The affirmance by the Fifth Circuit was on another ground. It held that "[t]he owner is not liable for a master's negligence in fighting fires, unless the supervision exercised by the owner is also negligent". (734 F. 2d, at p. 216.)

The Circuit interpreted the District Court's finding that the master's actions were not attributable to the owner as stating "in different words that management level employees did not know of any obviously unwise course of action taken by the Master that would require the owner to rigidly overrule the Master's 'good faith latitude in professional judgment' by relieving him of his command." (734 F. 2d, at p. 215.) With respect to the ruling that there was no design or neglect in the steps taken to extinguish the fire, as the District Court relied on a finding of absence of control by management and the Circuit Court relied on its determination that supervision by management was not improper and that management was unaware that the plan was "obviously unwise", there were no concurrent findings of fact which might invoke the so-called "two court rule".

We think the decisions in *Great Atlantic & Pacific Tea Co., supra,* and *American Mail Line Ltd.,* v. *Tokyo Marine & Fire*

Insurance Company, 270 F. 2d 499 (9th Cir. 1959), holding that management has the duty to deal with fire aboard a vessel in port, are a complete answer to respondent's position that the owner can only be held liable if it dictated the fire fighting plan. (Brief in Opposition, p. 5.)

We think that respondent's position in that regard in any event is more favorable to cargo than is the Fifth Circuit's ruling in this case that there can be no liability so long as management level employees do not know that the course of action being taken is "obviously unwise". This ruling would seem to preclude liability even if management designed and prescribed use of the plan. Respondent's position thus could be taken as an indication that the Fifth Circuit's ruling on the law is wrong to that limited extent.

But the effect is greater than this. It is unrealistic to differentiate between orders and suggestions to the Master by the Home Office when the vessel is in port. The Master is always free to disagree, but the Home Office is always free to relieve him. In this case, the Master telephoned the Home Office every day. He did so either because he was instructed to do so, or because he felt he needed its approval and assistance. Since the plan of action had Home Office approval, if it were negligent, it was equally the negligence of the Master and the Home Office.

Whether, and, if so, under what circumstances, management must take control is a question of law. The same issue arises in cases involving limitation of liability. Gilmore and Black, *The Law of Amiralty* (2d ed. 1975), pp. 877-895. In the opinion of Judge Friendly of the Second Circuit expressed in the *Petition of Kinsman Transit Company (The SHIRAS)*, 338 F. 2d 708, at p. 715, and in the opinion of Professors Gilmore and Black expressed in *The Law of Admiralty, supra*, at pp. 890, 894, this question is in urgent need of decision by this Court.

Burden of Proof. (Petition, p. 13.)

Respondent asserts that the decisions by the Fifth Circuit herein and by the Second Circuit in *EURYPYLUS, supra,* are only apparently in conflict with the decision of the Ninth Circuit in *Sunkist, supra,* as the ruling in the latter case on burden of proof is *obiter dictum,* having been unnecessary as the facts in any event established design or neglect. (Brief in Opposition, pp. 6, 11.)

This is not so. The District Court found that the deficiencies were solely the fault of the crew, and hence not the design or neglect of the owner. (603 F. 2d, at p. 1331.) Moreover, neither the Second Circuit in *EURYPYLUS* nor the Fifth Circuit in this case deemed the *Sunkist* decision to be *obiter dictum.*

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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